Road Works, Inc. *and* Southern California District Council of Laborers and its Affiliated Local Laborers International Union of North America, Local 1184. Case 21–RC–021306

June 14, 2012

DECISION AND DIRECTION

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND BLOCK

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held on August 18, 2011,[1] and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 6 votes for and 4 against the Petitioner, with 3 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.

Background

The Employer performs asphalt crack and joint sealing on roads and parking lots. Three brothers, Nathan, Larry, and Michael Blocker, own the Employer. At the election, three ballots were challenged: Javier Castro's, Mike Wessel's, and Daniel Blocker's.[2] The hearing officer recommended sustaining the challenges to Castro's and Blocker's ballots, finding that Castro and Blocker voluntarily quit their employment with the Employer prior to the eligibility period. The hearing officer recommended overruling the challenge to Wessel's ballot. However, given his recommendations as to Castro's and Blocker's ballots, Wessel's ballot was no longer determinative of the election outcome. Thus, the hearing officer recommended certifying the Petitioner.

The Employer has excepted to the hearing officer's recommendation regarding Blocker's ballot, contending that Blocker did not quit his employment. We find merit in that exception.[3] Accordingly, we shall direct that the Regional Director open and count Blocker's and Wessel's ballots and issue a revised tally of ballots and the appropriate certification.

[1] All dates are 2011, unless otherwise stated.

[2] Daniel Blocker is the three owners' nephew. This decision refers to him as Blocker.

[3] There are no exceptions to the recommended dispositions of Castro's and Wessel's ballots.

Blocker's Employment

From March through late June, Blocker worked as a field construction employee on the Employer's City of San Diego project. At some point during that project, he also began a part-time night job in San Diego. Some of the Employer's other employees also had outside employment. In June, Blocker asked the Employer's office assistant, Ali Tran, for a reduction in hours, but he never told Tran that he intended to quit.

In late June, the City of San Diego project on which Blocker was still working was halted due to a wage complaint, and the Employer did not complete any additional work on the project before the August election. Blocker did not work on any of the Employer's other projects after the City of San Diego project was halted. He continued his part-time job, increasing his hours there.

Blocker, Nathan Blocker, and Tran all testified that Blocker did not quit his employment with the Employer. Tran testified that Blocker was an "active" employee, and that Blocker was not laid off or terminated by the Employer. All three testified that Blocker was in touch with Nathan Blocker and Tran some time in August or September about the prospects for restarting the San Diego project and Blocker's continued interest in working on it.

Employee Jose Cervantes testified that, in June, Blocker told him that he "was going to leave the company, and that he had an interview at a new job." Blocker denied making this statement, and the hearing officer did not make a credibility determination. Nathan Blocker testified:

> I've had multiple conversations [with Blocker about him returning to work]. . . . And a lot of it was mainly around San Diego coming to an end. And then, you know, if he got a better job or whatever, he was going to go where work is better. But he's working night[s] at a pizza place, so he could work days [for the Employer] and—didn't know when San Diego is going to start back up.

Tran testified that Blocker said that he intended to work at his new part-time job until the San Diego project resumed. He also testified that the Employer hired additional employees after Blocker stopped working, but that the new hires were not meant to replace Blocker.

The Hearing Officer's Report

The hearing officer concluded that Blocker voluntarily quit his employment about 2 months before the election in favor of increased hours at his other job. Specifically, he found that Blocker told witnesses that he was leaving the Employer and then left; that Blocker could have con-

tinued to work for the Employer between late June and the election date but chose to quit; that there was no evidence or contention that the Employer allows employees to pick and choose specific projects; that the Employer hired new employees after Blocker left but did not recall Blocker to work; and that the Employer did not lay off Blocker or grant him a leave of absence.

Discussion

The party challenging a ballot bears the burden of proving that the individual is ineligible to vote. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1050 (2003); *Regency Services Carts*, 325 NLRB 617, 627 (1998). When a ballot is challenged on the ground that a voter has quit his or her employment prior to the election, the challenging party must demonstrate that the voter manifested a clear intent to quit before the election. See *Orange Blossom Manor*, 324 NLRB 846, 847 (1997) (sustaining challenge where employee clearly and unambiguously expressed intent to resign); cf. *Foote & Davies, Inc.*, 262 NLRB 238, 238 (1982) (finding that employee did not abandon interest in his struck job absent evidence of "a clear intention to quit"). The Petitioner, the challenging party here, has not met this burden.

Blocker, co-owner Nathan Blocker, and office assistant Tran all denied that Blocker quit. Although employee Cervantes testified that Blocker told him that he "was going to leave the company," Blocker disputed Cervantes' testimony, and the hearing officer did not credit Cervantes' testimony over Blocker's. Moreover, even assuming the hearing officer implicitly credited Cervantes, his testimony does not clearly and unambiguously show that Blocker intended to quit *before the election*. Nathan Blocker's testimony, quoted above, that Blocker said "he was going to go where work is better," likewise fails to demonstrate that Blocker manifested a clear and unambiguous intent to quit. And, after the City of San Diego project was halted, Blocker demonstrated his interest in continued employment with the Employer by asking Nathan Blocker and Tran about the prospects for that project restarting and by confirming his interest in working on the project when it did.

In finding that Blocker had quit prior to the election, the hearing officer found that the Employer performed other jobs in San Diego that Blocker could have worked on. However, nothing in the record indicates that the Employer was working on other jobs in or near San Diego. And the mere fact that there might have been work elsewhere does not show that Blocker quit by not taking that work.[4] In this regard, the hearing officer found that Blocker had "rejected" other work with the Employer, but there is no evidence that the Employer offered Blocker work that he rejected. The hearing officer also found that "Tran testified . . . that if Blocker had not ended his work with the Employer, he would have worked for the Employer between late June and September." Contrary to the hearing officer, and as indicated above, Tran never testified that Blocker ended his work with the Employer.

The hearing officer's remaining findings—i.e., that there was no evidence the Employer allows employees to pick and choose their work assignments, that the Employer hired new employees after Blocker left, and that the Employer did not lay off Blocker or grant him a leave of absence—do not prove that Blocker quit. To the contrary, Blocker's inquiries about the prospects for the San Diego project restarting, his expressed interest in resuming work on that project, and the mutually corroborative testimony of Blocker, Nathan Blocker, and Tran denying that Blocker quit warrant a conclusion that he did not quit his employment with the Employer. At a minimum, we find that the Petitioner did not meet its burden of demonstrating that Blocker manifested a clear intent to quit before the election. Accordingly, we reverse the hearing officer's finding that Blocker voluntarily quit his employment, and we overrule the Petitioner's challenge to his ballot.[5]

DIRECTION

IT IS DIRECTED that the Regional Director for Region 21 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Daniel Blocker and Mike Wessel, and thereafter prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

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[4] As the hearing officer noted, the Employer's base of operations in Pomona, California, is approximately 100 miles from San Diego, and the location of the Employer's other work is not in the record.

[5] The hearing officer also summarily found that there was no evidence that Blocker worked a sufficient number of days as a unit employee to be eligible under the *Daniel/Steiny* eligibility formula for construction-industry employees. See *Daniel Construction Co*., 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967); *Steiny & Co.*, 308 NLRB 1323 (1992). Contrary to the hearing officer, the record demonstrates that Blocker is eligible under that formula. We note, moreover, that the Petitioner never raised Blocker's alleged failure to meet that formula as a basis for challenging his eligibility.